Nik Adli bin Nik Abdul Aziz & Ors v Ketua Polis Negara & Ors

HIGH COURT (SHAH ALAM) — CRIMINAL APPLICATION NO 44–41 OF 2004

KN SEGARA J

1 SEPTEMBER 2004

Administrative Law — Remedies — Habeas corpus — Preventive detention — Extension order under Internal Security Act — Detention based on original grounds — Whether order must be served on detainee — Internal Security Act 1960 ss 8 & 11 — Federal Constitution art 151(1)

Preventive Detention — Extension order — Legality — Extension order under Internal Security Act — Detention based on original grounds — Whether order must be served on detainee — Whether any non compliance with procedural requirements — Internal Security Act 1960 ss 8 & 11

Preventive Detention — Security cases — Extension order — Legality — Extension order under Internal Security Act — Detention based on original grounds — Whether order must be served on detainee — Whether any non compliance with procedural requirements — Internal Security Act 1960 ss 8 & 11

The applicants challenged the legality of the extension order made by the minister. The applicants complained that there had been non-compliance with art 151(1) of the Federal Constitution in the making of the extension order and the service of it on the applicants. Counsel for the applicants also submitted that the allegations of fact on which the extension order was based was neither served nor created, thus depriving the applicants of their rights under s 11 of the Internal Security Act 1960 ('the Act').

Held, dismissing the application for *habeas corpus*:

(1) The making of the extension order under s 8(7) of the Act by the minister is clearly a discretionary act and decision on his part, within the ambit of the Act. Upon the affidavit evidence before the court, there had been no breach of any procedural requirement by the minister when he made the extension order and, therefore, there could be no judicial review on the extension order (see para 5).

(2) Article 151 of the Federal Constitution must be read together with the Act. All the requirements of art 151 of the Federal Constitution have been incorporated in ss 11, 12 and 16 of the Act. The provisions are consistent and harmonious with article 151 of the Federal Constitution. Based on the affidavit evidence before the court, there been no breach of ss 11, 12 and 16 of the Act by the minister when making the impugned extension order (see para 6).

(3) The applicants did not dispute that the allegations of fact on which the original order was based had been served on them and there was no dispute that the applicants had been availed all their statutory rights under s 11 of the Act, with respect to the original order, and that the process under s 12 of the Act duly observed and carried out, thereafter. The submission by the learned counsel for the applicants that the statement in writing of the allegations of fact was not served with the extension order was without merit, as the extension order was made on the same grounds as those on which the order was originally made and, consequently, the furnishing of the allegations of fact (again) did not arise. The furnishing of the allegations of fact only arises when the detention has been extended on wholly different grounds or, partly on different grounds, to that of the original order (see para 10).

[**Bahasa Malaysia summary**

Pemohon-pemohon mencabar kesahihan perintah lanjutan yang dibuat oleh menteri. Pemohon-pemohon mengadu bahawa terdapat ketidakpatuhan dengan per 151(1) Perlembagaan Persekutuan dalam membuat perintah lanjutan dan penyampaiannya ke atas pemohon-pemohon. Peguam bagi pihak pemohon-pemohon juga berhujah bahawa pengataan fakta berdasarkan perintah lanjutan dibuat tidak disampaikan mahupun dibuat, oleh itu menyebabkan pemohon-pemohon terkilan akan hak mereka di bawah s 11 Akta Keselamatan Dalam Negeri 1960 ('Akta tersebut').

Diputuskan, menolak permohonan untuk *habeas corpus* tersebut:

(1) Perintah lanjutan yang dibuat di bawah s 8(7) Akta tersebut oleh menteri dengan jelas adalah satu tindakan menurut budi bicara dan keputusan dipihak beliau, dalam ruang lingkup Akta tersebut. Berdasarkan keterangan afidavit di hadapan mahkamah, tiada perlanggaran apa-apa keperluan prosedur oleh menteri semasa beliau membuat perintah lanjutan tersebut dan, oleh itu, tidak perlu satu kajian semula dilakukan ke atas perintah lanjutan tersebut (lihat perenggan 5).

(2) Perkara 151 Perlembagaan Persekutuan hendaklah dibaca bersama Akta tersebut. Kesemua keperluan per 151 Perlembagaan Persekutuan termaktub dalam ss 11, 12 dan 16 Akta tersebut. Peruntukan-peruntukan tersebut adalah konsisten dan selari dengan per 151 Perlembagaan Persekutuan. Berdasarkan keterangan afidavit di hadapan mahkamah, tiada perlanggaran ss 11, 12 dan 16 Akta tersebut oleh menteri semasa membuat perintah lanjutan yang dipersoalkan itu (lihat perenggan 6).

(3) Pemohon-pemohon tidak mempertikaikan pengataan-pengataan fakta yang mana perintah asal tersebut dibuat telah disampaikan ke atas mereka dan tiada pertikaian bahawa pemohon-pemohon telah menggunakan

segala hak statutori mereka di bawah s 11 Akta tersebut, yang berkaitan dengan perintah asas, dan bahawa proses di bawah s 12 Akta tersebut telah diteliti dan dilaksanakan sewajarnya, selepas itu. Penghujahan oleh peguam bijaksana bagi pihak pemohon-pemohon bahawa kenyataan bertulis tentang pengataan-pengataan fakta tersebut tidak disampaikan dengan perintah lanjutan tidak bermerit, kerana perintah lanjutan tersebut dibuat atas alasan yang sama dengan perintah asal yang dibuat dan, dengan itu, pengataan fakta yang dikemukakan (sekali lagi) tidak timbul. Pengemukaan berhubung pengataan fakta hanya timbul apabila penahanan dilanjutkan berdasarkan alasan yang berbeza atau, sebahagiannya merupakan alasan yang berbeza, daripada perintah asal (lihat perenggan 10).]

Notes

For cases on *habeas corpus,* see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 494–548.

For cases on legality of extension order, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) para 1418.

For cases on security cases generally, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras1474–1490.

Legislation referred to

Federal Constitution art 151(1)
Internal Security Act 1960 ss 8(1), (7), 8B(1), 11, (2)(b), 12, 16

Edmund Bon (Edward Saw, Amer Hamzah bin Arshad and Muhammad Faiz bin Fadzil with him) (Chooi & Co) for the applicants.

Mohamad Hanafiah bin Zakaria (Senior Federal Counsel) (Abdul Wahab bin Mohamad, Raja Rozela bte Raja Toran and Sharlyza Alis bte Sharkawi with him) (Attorney General's Chambers) for the respondents.

KN Segara J:

[1] There are 13 applicants in this application for *habeas corpus* before me. All of them had been detained under the Internal Security Act 1960. However, eight of them withdrew their application on 28 August 2004 and the hearing proceeded only in respect of applicants No 1, 2, 5, 7 and 8. At the out-set of the hearing, counsel for the said five applicants stated that the facts in respect of the said five applicants' detention were similar and he would, therefore, be relying on the affidavit of applicant No 1 (first applicant).

[2] It is common knowledge that the first applicant, Nik Adli bin Nik Abdul Aziz, is the son of the current Menteri Besar of Kelantan. I take this opportunity to commend counsel for not making any insinuation that the detention of the first applicant and the four others has been politically motivated.

The challenge before me by the applicants is on the legality of the extension order made by the minister, dated 22 September 2003, for a period of two years, with effect from 24 September 2003.

[3] The first applicant and the four others were detained under s 8(1) of the Internal Security Act 1960 (the 'Act') for a period of two years with effect from 24 September 2001 pursuant to a detention order (original order) dated 23 September 2001, with a view to preventing the said applicants from acting in any manner prejudicial to the security of Malaysia. On 22 September 2003, the said applicants' original order was extended for another two years under s 8(7) of the Act, with effect from 24 September 2003 ('extension order').

[4] Section 8B(1) of the Act clearly prohibits any judicial review in any court or the exercise of any jurisdiction in respect of any act done or decision made by the Yang di-Pertuan Agong or the minister, in the exercise of their discretionary power in accordance with the Act, save in regard to any question on compliance with any procedural requirement in the Act, governing such act or decision.

[5] The making of the extension order under s 8(7) of the Act by the minister (the second respondent herein) is clearly a discretionary act and decision on his part, within the ambit of the Act. However, in making that extension order, has there been any procedural non-compliance with any requirement in the Act? Upon the affidavit evidence before me, I am entirely satisfied that there has been no breach of any procedural requirement by the minister when he made the said extension order and, therefore, there can be no judicial review on the said extension order. The application before me must accordingly be dismissed.

[6] The complaint by the counsel for the applicants is that there has been non-compliance with art 151(1) of the Federal Constitution in the making of the said extension order and the service of it on the applicants. Article 151 of the Federal Constitution must be read together with the Act. All the requirements of art 151 of the Federal Constitution have been incorporated in ss 11, 12 and 16 of the Act. The said provisions are consistent and harmonious with art 151 of the Federal Constitution. Now, has there been any breach of ss 11, 12 and 16 of the Act by the minister when making the impugned extension order herein? Based on the affidavit evidence before me, the answer must certainly be in the negative.

[7] The learned counsel for the applicants submitted that the allegations of fact on which the extension order is based was neither served nor created, thus depriving the applicants of their rights under s 11 of the Act. There is a serious fallacy in this argument.

[8] The applicants do not dispute that the allegations of fact on which the original order was based has been served on them and there is no dispute that

the applicants have been availed all their statutory rights under s 11 of the Act, with respect to the original order, and that the process under s 12 of the Act duly observed and carried out, thereafter. In the circumstances, there is a total failure on the part of counsel for the applicants to appreciate the provisions of s 8(7) of the Act pursuant to which the extension order has been made by the minister. Section 8(7) of the Act reads:

> The Minister may direct that the duration of any detention order or restriction order be extended for such period, not exceeding two years, as he may specify, and thereafter for such further periods, not exceeding two years at a time, as he may specify, either:
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> (a) on the same grounds on which the order was originally made;
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> (b) on grounds different from those on which the order was originally made; or
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> (c) partly on the same grounds and partly on different grounds.
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> Provided that if a detention order is extended on different grounds or partly on different grounds the person to whom it relates shall have the same rights under s11 as if the order extended as aforesaid was a fresh order, and s 12(1) shall apply accordingly.

[9] It is patently clear from the affidavit of the minister (encl 10, paras 5 and 6) that the duration of the original order was extended on the same grounds as those on which the original order was made. No affidavit has been filed by the applicants to contradict this. Paragraphs 5 and 6 of encl 10 reads as follows:

> 5 Selanjutnya, saya menyatakan bahawa pada 22 September 2003, berdasarkan penelitian saya kepada laporan-laporan dan maklumat berhubung dengan kegiatan-kegiatan dan sikap serta tingkahlaku pemohon pertama, saya berpuas hati bahawa aktiviti-aktiviti yang telah dijalankan oleh pemohon pertama masih lagi boleh membahayakan dan menjejaskan keselamatan Negara Malaysia. Dengan itu, saya telah menggunakan minda saya dan memutuskan bahawa penahanan lanjutan terhadap pemohon pertama atas alasan yang sama adalah perlu bagi mencegah beliau daripada bertindak dengan apa cara sekalipun yang boleh memudaratkan keselamatan Malaysia. Maka dengan itu, saya telah berpuas hati bahawa adalah perlu tempoh perintah tahanan bertarikh 23 September 2001 yang dibuat di bawah s 8(1) Akta tersebut terhadap pemohon pertama, dilanjutkan atas alasan yang sama dengan alasan di atasnya perintah tahanan bertarikh 23 September 2001 itu dibuat. Saya tidak dapat mengemukakan laporan-laporan dan maklumat tersebut kerana berpendapat dengan berbuat demikian, ia adalah bertentangan dengan kepentingan negara seperti mana yang diperuntukkan di bawah s 16 Akta tersebut dan per 151(3) Perlembagaan Persekutuan.
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> 6 Maka, pada 22 September 2003, saya telah memerintahkan supaya pemohon pertama ditahan selama dua tahun selanjutnya mulai dari 24 September 2003, di Tempat Tahanan Perlindungan, Taiping.

Satu Salinan Perlanjutan Perintah Tahanan di bawah s 8(7)(a) Akta tersebut yang telah disahkan oleh Deputi Superintenden Polis Yusoff bin Mohd DSP E6B1, Ibu Pejabat Polis, Cawangan Khas, Bukit Aman yang mempunyai di jagaannya dokumen tersebut adalah dilampirkan dan ditandakan sebagai 'AA–2'.

[10] The proviso to s 8(7) unequivocally specifies that those whose detentions have been extended on different grounds or parfly on different grounds are entitled to exercise the same rights under s 11 as a the extended orders are original orders, to other words, they are entitled to make representations against the extension orders to the Advisory Board. Such entitlement would invoke the application of s 11(2)(b) which, *inter alia*, requires the detainee to be furnished by the minister with a statement in writing of: (i) grounds on which the order is made; and (ii) of the allegations of fact on which the order is based. Therefore, the submission by the learned counsel for the applicants that the statement in writing of the allegations of fact was not served with the extension order is without merit, as the extension order was made on the same grounds as those on which the order was originally made and, consequently, the furnishing of the allegations of fact (again) does not arise. The furnishing of the allegations of fact only arises when the detention has been extended on wholly different grounds or, partly on different grounds, to that of the original order.

[11] In the light of the affidavit evidence before me, any allegation that the minister had either not applied his mind fairly and had taken irrelevant matters into consideration, or has acted in a mechanical fashion, in making the extension order, is baseless and without merits.

[12] The application for *habeas corpus* by the first, second, fifth, seventh and eight applicants herein is dismissed and the application of all the other applicants is struck off.

Application dismissed.

Reported by Loo Lai Mee